IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 216

BYRON J. WALTERS,

Petitioner,

vs.

EDITH MAUD WILSON,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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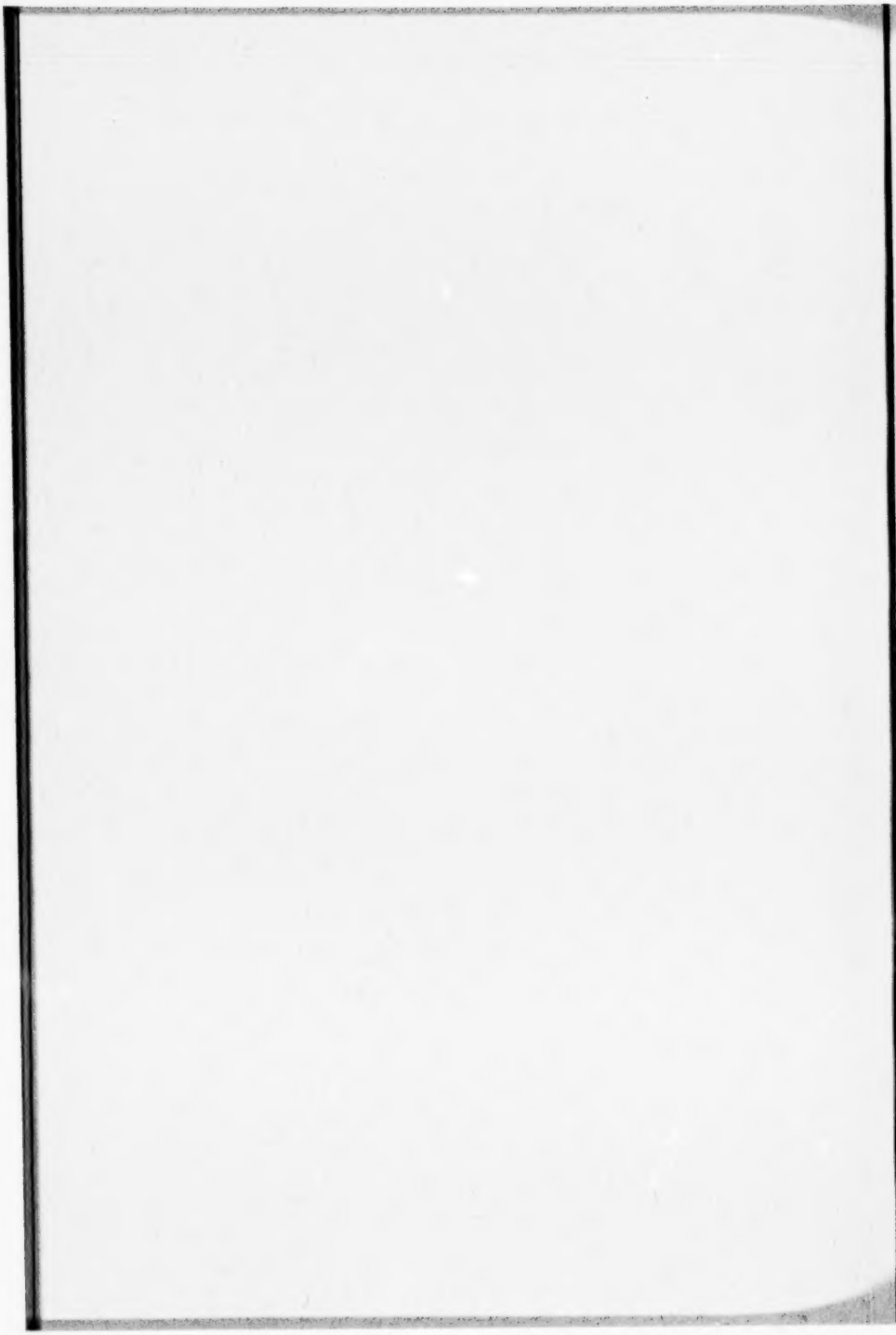

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan P. Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

May it please the Court:

The petition of Byron J. Walters respectfully shows:

I.

Jurisdiction.

Jurisdiction herein is based upon Judicial Code Section 240-a, as amended.

Reference is made to rule No. 38-5 (b) of the Supreme Court wherein is specified some of the reasons which will be considered by this Court in the exercise of its sound judicial discretion with respect to the issuance of the writ of certiorari.

II.

Summary Statement of the Case.

For the purpose of clarity, petitioner herein will sometimes be referred to as bankrupt, and respondent as creditor.

Bankrupt herein was duly adjudicated bankrupt on the 9th day of June, 1939; he was finally discharged by order of the District Court below from all his debts and obligations which were dischargeable on the 10th day of August, 1939 [R. 2-5].

In said proceedings, had in pursuance of said adjudication in bankruptcy, the claim of respondent herein was duly scheduled and due notice given [R. 4].

No claim was filed by respondent in said bankruptcy proceedings and no objection to petitioner's discharge was filed by respondent or any other person [R. 4-5].

Thereafter, in the month of May, 1940, creditor herein commenced proceedings under Section 710, Code of Civil Procedure of the State of California, whereby creditor sought to levy upon the salary of bankrupt as judge of the Municipal Court of the City of Los Angeles [R. 5], asserting that certain sums were due to creditor from bankrupt by virtue of that certain judgment of the Superior Court of the State of California, in and for the County of Los Angeles, rendered August 20, 1937, in case No. 418755 entitled Edith Maud Wilson v. Byron J. Walters and William B. Johnston. That said judgment was assertedly based, in turn, upon a former judgment of the same court in case No. 328599, entitled Edith Maud Wilson v. Byron J. Walters *et al.*, which said judgment was entered in or about the month of August, 1932.

Thereafter bankrupt duly filed in said Superior Court his motion to release the moneys held by virtue of the proceedings under Section 710, Code of Civil Procedure, upon the following grounds [R. 6]:

1. That the salary of bankrupt as a judge of the said Municipal Court was exempt from levy under Section 710, Code of Civil Procedure, because bankrupt was the holder of a constitutional office of the State of California.

2. That the judgment in said proceedings asserted, and the debt represented thereby, had been discharged in bankruptcy by virtue of the final discharge of bankrupt issued by the District Court on August 10, 1939.

That thereafter said Court granted said motion upon the ground that the office of bankrupt as judge of said Municipal Court was a municipal affair and not subject to legislative control [R. 93], and therefore his salary was not subject to levy under Section 710, Code of Civil Procedure. Whereupon creditor appealed and thereafter the District Court of Appeal of the State of California, in and for the Second Appellate District, affirmed the order of the Superior Court upon the ground that bankrupt herein was a constitutional officer of the State of California, and that his salary as such constitutional officer was not subject to levy under Section 710, Code of Civil Procedure [R. 6-93-94] and found it unnecessary to pass upon the Fraud or bankruptcy questions.

Whereupon creditor petitioned for, and was granted, a hearing in the Supreme Court of California, after judgment of the District Court of Appeal. That thereafter the Supreme Court of California reversed the order of the Superior Court, and the decision of the District Court of Appeal, and remanded the cause to the Superior Court

for further proceedings, upon the following grounds [R. 6-94]:

1. That the salary of bankrupt was subject to levy under Section 710, Code of Civil Procedure, and in so holding said Supreme Court reversed the case of *Gamble v. Utley,* 86 Cal. App. 414 (1914), which had long been the rule of decision in California (the doctrine announced in said case with relation to the attachment of salaries of public officers being in agreement with the accepted theory of the overwhelming weight of authority throughout the United States), and

2. That said judgment had not been discharged by the final discharge of bankrupt because it was founded upon a liability for money obtained by false and fraudulent representations [R. 19-24]; and in so holding the California Supreme Court disapproved the case of *Marr v. Superior Court,* 30 Cal. App. (2d) 275, 86 Pac. (2d) 141, relied upon by petitioner, which had long been the rule of decision in California (which said case followed *Crawford v. Burke,* 195 U. S. 176) [R. 22].

That said case is now pending in said Superior Court.

Whereupon bankrupt brought the instant proceeding before the United States District Court, seeking the protection of the forum which had granted his discharge in bankruptcy, and invoking the exercise of the equitable powers of said Court to protect the sanctity of its own decrees, in the exercise of its jurisdiction essentially federal and exclusive in character [R. 3].

Upon the filing of the petition for injunction therein, an order to show cause was issued by the District Court and made returnable before a referee in bankruptcy

thereof [R. 10]. The issues were presented by the verified petition [R. 3] and affidavits [R. 18; 51], without oral testimony and upon the records, files and papers therein [R. 95].

Thereupon the referee wrote an opinion [R. 61-79] and entered findings of facts, conclusions of law [R. 79-91] and an order denying to bankrupt any relief whatsoever [R. 111-115].

The referee in his opinion [R. 61-79] views the questions presented as follows (1) does the bankruptcy court have any jurisdiction at all to entertain the petition upon which the order to show cause was issued? and, (2) if the bankruptcy court does have jurisdiction, to what extent should it be exercised? [R. 66]. He holds that the Court has unlimited jurisdiction to do what it believes should be done and that in doing so, *it is not bound by the decision of the Supreme Court of the State of California* (Emphasis ours) [R. 69]. In considering to what extent the jurisdiction should be exercised, he states [R. 69]:

> "Accordingly, *I find myself unable to agree with the proposition that the previous decision of a State Court on the dischargeability of a given debt is res judicata* and that it prevents the Bankruptcy Court from passing on the question, as has been held in Prebyl v. Prudential Ins. Co., 1938, C. C. A. 8, 98 Fed. (2) 199; 37 A. B. R. (N. S.) 324; in In re Marshall, 1938, D. C. S. D. N. Y. 24 Fed. Supp. 1012; 39 A. B. R. (N. S.) 89; *and in the very recent case of Hobbs v. Franklin,* October 31, 1942, C. C. A. 5, 131 F. (2) 432 Commerce Clearing House, Paragraph 54,043, Page 55,037.
>
> "I am entirely satisfied that in this case the Bankruptcy Court has *unlimited jurisdiction* to do that

which it believes should be done and that in doing so it is *not bound* by the decision of the Supreme Court of the State of California in the matter. The fact that the bankrupt did not apply for a rehearing in that Court is, in my opinion, of no consequence and does not affect the situation in any way whatsoever.

"Since we have determined that the Bankruptcy Court has jurisdiction to entertain the bankrupt's petition which is before us for consideration, our next problem is to determine to what extent that jurisdiction should be exercised. The much discussed Supreme Court case of Local Loan Co. v. Hunt, 1934, 292 U. S. 234; 54 S. Ct. 695; 78 L. Ed. 1230; 24 A. B. R. (N. S.) 668, lays down the rule that the Bankruptcy Court should exercise its jurisdiction in cases involving the dischargeability of debts in a bankruptcy proceeding only where unusual circumstances exist.

"I believe that under this rule the Bankruptcy Court should exercise its jurisdiction in these instances:

"1. Where it appears that the bankrupt's circumstances are such that he will be unable to defend himself against a threatened action in the State Court, or, if such action is already being prosecuted against him, that he will be unable to proceed with it.

"2. Where it appears that an erroneous decision has been made in a subordinate State Court and that it may not be possible to correct the same on appeal, even though the bankrupt's circumstances are such that he is able to proceed with the matter in the State Court.

"3. Where in an action which has been decided by the highest Court of a State it appears that, for

any reason, the bankrupt has not had a fair opportunity to present his case.

"4. Where in an action which has been decided by the highest Court of a State it appears that the decision of that Court is clearly wrong.

"Obviously, if the decision of the highest Court of the State is clearly right, there is no need for the Bankruptcy Court to intervene. Likewise, if the questions presented to the highest Court of the State for decision are debatable, that is, if they are questions upon which reasonable minds may differ, the Bankruptcy Court should not take over, if the bankrupt has had a fair opportunity to present his case in the State Court. It is only where it appears that the decision in the highest Court of the State is clearly wrong that the Bankruptcy Court should assume jurisdiction . . ." (Emphasis ours.)

He then holds that the decision of the California Supreme Court is not clearly wrong but debatable; that the District Court should therefore not assume jurisdiction and that the bankrupt's petition should be denied [R. 76].

After so holding that the Court *should not assume* jurisdiction, the referee made findings of fact Numbers IV, V, VI and VII [R. 89], in which he affirmatively finds that the judgments of creditor against bankrupt are liabilities for obtaining money by false representations, and that the said debts and judgments thereby created are not dischargeable in bankruptcy. He likewise makes conclusions of law Numbers I and II [R. 90] to the effect that the judgments are not dischargeable in bankruptcy, and No. IV [R. 90] that the Court has jurisdiction to hear and determine the petition of bankrupt, but *under the circumstances of the case should not exercise said juris-*

diction, and on that ground the petition for injunction should be denied.

Bankrupt filed a petition for review from the order based on said findings and conclusions [R. 92-99] and after hearing, the Court upon its own motion entered an order vacating the submission and set the case for reargument [R. 101-103] in words as follows:

"ORDER VACATING SUBMISSION AND SETTING CAUSE FOR REARGUMENT.

A study of the record on review suggests the following considerations:

"The second cause of action which charged misrepresentation in obtaining the loan advances was, like the other three, directed at both defendants. Judgment was prayed for jointly against both defendants for the principal sum of $6430.00, although the amount was split up in several sums for the computation of interest. The damage alleged to flow from the misrepresentations in the second cause of action was the sum of $6430.00, being the total sum alleged to have been advanced in the other counts of the Complaint.

"We thus have through the Complaint a prayer for a judgment *in solido* against both defendants. In the Stipulation for judgment, which was carried into the judgment, there was a segregation of liabilities and judgment was stipulated to be rendered and then rendered jointly against Walters and Johnston in the sum of $5700.00, with interest at seven per cent from September 28, 1929, and then against Johnston individually for the balance of $730.00, divided into three sums for the purpose of computing interest. It is the law of the United States and the law of California that the liability of joint tort feasors can-

not be segregated and that only one judgment can be entered. [Washington Gas & Light Co. v. Landsden, 1898, 172 U. S. 534, 552-53; Reynolds v. New York Trust Co., 2 Cir., 1911, 188 Fed. 611; Miller v. Union Pacific Ry. 1933, 290 U. S. 227; Bee v. Cooper, 1932, 217 C. 96; Curtis v. San Pedro Transportation Co., 1935, 10 C. A. (2) 547; Phipps v. Superior Court, 1939, 32 C. A. (2) 371.]

"As the second cause of action alleged misrepresentations by both defendants and sought judgment against both for the total debt of $6430.00, does not the fact that the stipulation for judgment and the judgment divided the liability by awarding judgment against both defendants jointly for $5700.00 and against the defendant Johnston alone for $730.00, indicate that the judgment stipulated to was one for money loaned and advanced on a contractual basis, rather than a judgment awarding damages for a tort?

"In view of the fact that damages in tort cannot be apportioned as between joint tort feasors according to their degree of participation, does not the fact that, despite the charge against both, the judgment proceeds to make such apportionment indicate that it was not a judgment on a cause of action for tort? As this phase does not seem to have been considered in the proceedings, and is not touched by the Supreme Court of California in its decision in Wilson v. Walters, 1941, 19 C(2) 111, the order submitting the petition for review, heretofore entered on March 22, 1943, is hereby vacated, and the cause is set down for further argument on April 19, 1943, at ten o'clock A.M.,—the argument to be confined to the questions here raised.

Dated this 31st day of March, 1943.

LEON R. YANKWICH, Judge."

After argument based on such order for reargument, the Court entered its minute order on review [R. 104] in words following:

"MINUTE ORDER ON REVIEW.

The bankrupt's petition for review of the order of the Referee, dated January 6, 1943, in which he denied the petition of the said bankrupt for an order restraining one Edith Maud Wilson, a creditor of said bankrupt, from prosecuting a certain judgment against him, heretofore argued and submitted, is now decided as follows:

"The order of the Referee in so far as it denies the injunction sought by the bankrupt is affirmed. The said order, in all other respects, and the findings of fact are reversed.

"On further consideration of the matter and of the questions propounded in the memorandum of March 31, 1943, I am of the view that the Referee was right in declining to take jurisdiction. While on a question of substantive law, we might substitute our judgment for that of a state court, the determination that the judgment here involved was one in tort turns upon question of California pleading. And the decision of the Supreme Court of California on the subject (Wilson v. Walters, 1941, 19 C(2) 111) should be accepted as binding on the bankruptcy court.

"None of the unusual circumstances warranting assumption of jurisdiction, which the Supreme Court envisaged in Local Loan Co. v. Hunt, 1934, 292 U. S. 234, 241, exists. (*And see: Hobbs v.*

Franklin Jewelry Co., Inc., 1942, 5 Cir., 131 F(2) 432.)

"The Referee's findings of fact are vacated and set aside and the bankrupt's petition is ordered dismissed solely upon the ground that no unusual circumstances exist for assuming jurisdiction after final determination of the state court.

Dated this 3rd day of May, 1943" [R. 104]. (Emphasis ours.)

Thereafter, petitioner filed his motion for a new trial and rehearing [R. 107-109] which was on May 24, 1943, by said District Court denied [R. 110].

Whereupon the bankrupt appealed from said minute order of the District Court to the Honorable United States Circuit Court of Appeals for the Ninth Circuit [R. 114 *et seq.*]. A copy of the opinion of the Circuit Court of Appeals is included in the record [R. 133-135]; also reported in 142 F. (2d) 59. In this opinion the Circuit Court stated in part:

"Thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California, and which had there been determined against him. This he could not do. (Citing cases.)

"The Referee's order was correct. The Bankruptcy Court's judgment, which affirmed the order in part and reversed it in part, is so modified so as to affirm it *in toto*.

"As thus modified, the judgment is affirmed."

III.

Summary Statement of the Facts.

On September 28, 1929 (just before the financial crash occurring later in the autumn of 1929) your petitioner, together with William B. Johnston, borrowed six thousand dollars ($6,000.00) from respondent executing their promissory note therefor [R. 37]. As security for the payment of said note petitioner executed and delivered to respondent certain assignments of attorney's fees [R. 39, 40], and also petitioner and said Johnston as of even date executed another document [R. 56].

Thereafter, in or about the month of September, 1931 (before petitioner was appointed a Judge of the Municipal Court of the City of Los Angeles, on August 2, 1937, by the Governor of the State of California [R. 7]) respondent filed a complaint against petitioner and said William B. Johnston [R. 28-44].

Said complaint was in four counts and was entitled "Complaint for Damages and for Breach of Contract."

The first cause of action may be described as one on an express promise to repay money loaned.

The second cause of action contains certain allegations concerning false representations.

The third cause of action is an action upon a promissory note.

The fourth cause of action is upon money loaned.

It is clearly apparent that three of the four causes of action stated in the complaint are actions *ex contractu*. The relief prayed is for judgment as upon the causes of action *ex contractu*, including the *specific amounts* set forth in the *contracts* pleaded.

It should be noted that the prayer requests attorney's fees, which are stipulated in the contracts pleaded, and further requests interest at 8 per cent, as stipulated in the contracts pleaded, and does not request interest at the legal rate, which in California is 7 per cent.

It should be further noted that no other recovery is requested in the way of damages, or otherwise, than the *normal recovery under the contracts.*

On October 31, 1931, petitioner filed an answer to said State Court action No. 328599 [R. 53-59] in which he admits the execution of the promissory note alleged in counts II and III of said complaint and denies each and every allegation of fraud contained in count II of said complaint and sets up the defense of usury. That said action was never tried before any Court [R. 45]. Thereafter on August 12, 1932, petitioner signed a stipulation for judgment [R. 44-45]. Thereafter on August 17, 1932, judgment was entered by said Court on said stipulation in language following [R. 46-47]:

> "The plaintiff having filed her complaint herein praying for judgment against defendants upon certain allegations as stated in the complaint, and the defendant Byron J. Walters having answered said complaint personally without counsel, and the defendant William B. Johnston having filed no answer nor made any appearance herein, and the said cause having been set for trial before a jury and the defendant having signed and filed a stipulation for judgment herein waiving trial, findings of fact and conclusions of law, and the said defendants having stipulated that judgment may be taken and entered herein in accordance with the allegations of the complaint in certain amounts as hereinafter set forth.

"Now therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff do have and recover from the defendant Byron J. Walters and William B. Johnston the sum of Fifty-seven Hundred Dollars ($5700.00) with interest at seven per cent per annum from Sept. 28, 1929; and that the plaintiff do have and recover from defendant William B. Johnston the sum of Six Hundred Dollars ($600) with interest at seven per cent per annum from December 27, 1929, and the further sum of One Hundred Dollars ($100) with interest at seven percent per annum from June 27, 1930, and the sum of Thirty Dollars ($30) with interest at seven per cent per annum from July 18, 1930.

It Is Further Ordered, Adjudged and Decreed that all parties pay their own court costs herein.

Dated at Los Angeles, California, this 17 day of August, 1932.

HENRY M. WILLIS
Judge of the Superior Court."

Thereafter, in July, 1937, respondent filed her complaint in said State Court to renew said judgment [R. 47]. On August 20, 1937, default judgment against petitioner and said Johnston was entered [R. 50].

Thereafter on June 9, 1939, petitioner herein was duly adjudicated bankrupt and finally discharged by order of the District Court below from all his debts and obligations which were dischargeable on the 10th of August, 1939 [R. 2-5]. In said proceedings the claim of respondent herein was duly scheduled and due notice given [R. 4].

No claim was filed by respondent in said bankruptcy proceedings and no objection to petitioner's discharge was filed by respondent or any other person [R. 4-5].

Thereafter, such proceedings were had and taken as are set forth chronologically in this petition for a writ of certiorari under the heading numbered II entitled "Summary Statement of the Case".

The evidence at the first hearing before the Referee in the United States District Court below is all contained [R. 15] in the petition filed herein in the District Court and upon which the instant proceeding is based [R. 3-9] and upon the verified answer (although entitled affidavit) of respondent Wilson in opposition to the said petition [R. 18-51]; and upon the affidavit of petitioner herein in answer to said affidavit of respondent [R. 51-59].

No other evidence was taken before the District Court upon the petition for review.

IV.

The Questions Presented.

The questions presented are:

1. Does the United States District Court have jurisdiction to consider bankrupt's ancillary petition in equity therein presented?

   (a) If so, is it an unlimited jurisdiction, or is it a limited jurisdiction—that is—must unusual circumstances exist before the District Court is permitted to take jurisdiction?

   (b) If unusual circumstances must exist—what are they? How may they be defined or recognized or "envisaged" and do they exist in this case?

   (c) Are the United States Courts bound by the decisions of the highest Court of a State on the question whether or not the judgments against

bankrupt are debts excepted from the operation of the final discharge of bankrupt within the meaning of Section 17(a) 2 of the Bankruptcy Act (11 U. S. C. A. Sec. 35)?

(1) Are the United States Courts bound to accept State Court decisions as the rule of decision applicable?

(2) Is the California Supreme Court decision (*Wilson v. Walters,* 19 Cal. (2d) 111, 119 Pac. (2d) 340) *res adjudicata* in the instant proceeding?

2. Is the debt represented by the judgment of creditor against bankrupt in the State Court a liability for obtaining money or property by false pretenses or false representations, within the meaning of Section 17(a)2 of the Bankruptcy Act (11 U. S. C. A. Sec. 35) or is it a liability *ex contractu* and therefore discharged by the final discharge in bankruptcy of petitioner?

V.

Reasons Relied on for the Allowance of the Writ.

Petitioner respectfully assigns the following reasons for the allowance of the writ of certiorari:

1. The Circuit Court of Appeals for the Ninth Circuit has decided a Federal question in a way probably in conflict with applicable decisions of this Court in failing to give effect, on the question of jurisdiction, to the decision of this Court in *Local Loan Co. v. Hunt,* 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, and in *Crescent Livestock v. Butchers Union,* 120 U. S. 141.

2. The decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decisions of other Circuit Courts of Appeals, notably in *re Skorcz* (Seventh Circuit), 67 Fed. (2d) 187; *Davison Paxon Co. v. Caldwell* (Fifth Circuit—1940), 115 Fed. (2d) 189; *Reynolds v. New York Trust Co.* (First Circuit), 188 Fed. 611, on the question of jurisdiction. (Other cases treated in Brief.)

3. The Circuit Court of Appeals for the Ninth Circuit has failed to follow applicable decisions theretofore rendered by it on the question of jurisdiction, notably *Sims v. Jamison* (1933) (C. C. A. Ninth Circuit), 67 Fed. (2d) 409; *Holmes v. Rowe* (1938) (C. C. A. Ninth Circuit), 97 Fed. (2d) 537; *Lowe v. California State Federation of Labor*, (C. C. A., Ninth Circuit) 189 Fed. 714; *San Francisco Shopping News Co. v. City of South San Francisco* (C. C. A. Ninth Circuit 1934), 69 Fed. (2d) 879.

4. The conflict created by the decisions of the Courts of the several Circuits on the vital questions here involved has arisen since this Court spoke in *Local Loan Co. v. Hunt;* and has arisen chiefly from a differing concept of the meaning of certain language in the *Local Loan* case. It therefore becomes important that this Court speak again to decide issues,

   (a) very important to a large number of people who appear as creditors and debtors in bankruptcy proceedings in the Federal Courts throughout the nation;

(b) and to decide a real and embarrassing conflict of opinion between the Circuit Courts of Appeal which creates a real injustice ~~to petitioner,~~ and has deprived him of substantial rights under the Bankruptcy Statutes. (*Layne v. Bowler Corp. v. Western Well Works,* 261 U. S. 387, 392.)

5. The Referee below, the District Court and the Circuit Court of Appeals have failed to take jurisdiction and decide the case on its merits, according to applicable decisions of this Court.

6. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the lower Court, as to call for an exercise of this Court's powers of supervision, in that the Circuit Court sustained the Referee in his order declining to take jurisdiction while at the same time reinstating the Referee's incomplete findings of fact and conclusions of law on the merits (which findings had been reversed by the District Judge on petition for review); said Circuit Court at the same time declining to rule on the merits, and review said findings.

7. The California Supreme Court decision (*Wilson v. Walters,* 19 Cal. (2d) 111), is not in accord with applicable decisions of this Court and it expressly repudiates several decisions of this Court, chief among which are *Crawford v. Burke,* 195 U. S. 176, 49 L. Ed. 147; *Tindle v. Birkett,* 205 U. S. 183, 51 L. Ed. 762; and is not in accord with the applicable law in California and the United States.

With due respect for the Courts below, we venture to suggest that the position in which petitioner now finds himself by virtue of their decisions is, to say the least, *utterly confusing* and when viewed in the aggregate verges closely upon the ridiculous. To correct the *obvious errors* and *confusion of thought* on the *important questions involved* in this proceeding we respectfully urge that this Honorable Court should grant the writ of certiorari.

The Referee ruled that the District Court has unlimited jurisdiction [R. 69] in language following:

> "Accordingly, I find myself unable to agree with the proposition that the previous decision of a State Court on the dischargeability of a given debt is *res judicata* and that it prevents the Bankruptcy Court from passing on the question, as has been held in Prebyl v. Prudential Ins. Co., 1938, C. C. A. 8, 98 Fed. (2) 199; 37 A. B. R. (N. S.) 324; in In re Marshall, 1938, D. C. S. D. N. Y. 24 Fed. Supp. 1012; 39 A. B. R. (N. S.) 89; *and in the very recent case of Hobbs v. Franklin*, October 31, 1942, C. C. A. 5, 131 F. (2) 432 Commerce Clearing House, Paragraph 54,043, Page 55,037.
>
> "I am entirely satisfied that in this case the *Bankruptcy Court has unlimited jurisdiction* to do that which it believes should be done and that in doing so it is *not bound by the decision of the Supreme Court of the State of California in the matter.*"

But, he says further [R. 69-70] that the case of *Local Loan Co. v. Hunt*, 292 U. S. 234 "lays down the rule that the Bankruptcy Court should exercise its jurisdiction . . . only where unusual circumstances exist." The Referee then sets forth four instances in which he

believes the Bankruptcy Court should exercise its jurisdiction [R. 70] and concludes that:

> "Obviously, if the decision of the highest Court of the State is clearly right, there is no need for the Bankruptcy Court to intervene. Likewise, if the questions presented to the highest Court of the State for decision are debatable, that is, if they are questions upon which reasonable minds may differ, the Bankruptcy Court should not take over, if the bankrupt has had a fair opportunity to present his case in the State Court. It is only where it appears that the decision in the highest Court of the State is clearly wrong that the Bankruptcy Court should assume jurisdiction."

After holding that the decision of the California Supreme Court (*Wilson v. Walters,* 19 Cal. (2d) 111, 119 Pac. (2d) 340) is not clearly wrong but that the questions therein cited are *debatable* the Referee ruled that the United States District Court should therefore not assume jurisdiction. Nevertheless he proceeded to make findings of fact and conclusions of law [R. 80-91] concluding as a matter of law "that this Court has jurisdiction to hear and determine the petition in this matter, but that, *under the circumstances in the case,* this Court should not exercise its said jurisdiction, and that, *upon that ground,* the petition of the bankrupt should be denied . . ." [R. 90]. (Emphasis ours.)

Upon petition for review the District Judge strongly indicated agreement with petitioner's position that the original judgment in the California Superior Court stipulated to by petitioner was one for money loaned on a contractual basis, rather than a judgment awarding damages for a tort (see: order vacating submission and setting

cause for reargument [R. 101-103].) The District Judge also stated that the points raised by him *had not been touched by the Supreme Court of California* in its decision in *Wilson v. Walters*, 19 Cal. (2d) 111 [R. 103]. He thereafter entered his minute order on review stating his view that the Referee was right in declining to take jurisdiction, and that

> "While on a *question of substantive law*, we might substitute our judgment for that of a State Court, the determination that the judgment here involved was one in tort turns upon the *question of California pleading*. And the decision of the Supreme Court of California on the subject (Wilson v. Walters, 1941, 19 C.(2) 111) *should be accepted as binding* on the Bankruptcy Court.
>
> "None of the *unusual circumstances* warranting assumption of jurisdiction, which the Supreme Court envisaged in Local Loan Co. v. Hunt, 1934, 292 U. S. 234, 241, exists (and see: Hobbs v. Franklin Jewelry Co. Inc., 1942, 5 Cir., 131 F. (2) 432).
>
> "The Referee's findings of fact are vacated and set aside and the bankrupt's petition is ordered dismissed *solely upon the ground that no unusual circumstances exist for assuming jurisdiction* after final determination of the State Court." [R. 104-105.] (Emphasis ours.)

On appeal the Circuit Court of Appeals in its opinion [R. 133-135] took the instant case out of the operation of the rule announced in *Local Loan v. Hunt*, 292 U. S. 234, by stating "appellant did not at that time petition the Bankruptcy Court to enjoin the enforcement of appellee's judgment." Then citing in the footnote No. 1:

> "*Cf.* Local Loan Co. v. Hunt, 292 U. S. 234."

There is nothing in the opinion of *Local Loan Co. v. Hunt, supra,* to warrant such distinction; and in the case of *Davison, Paxon Co. v. Caldwell* (Fifth Circuit—1940), 115 Fed. (2d) 189, the rule in *Local Loan Co. v. Hunt* was followed *after the petitioner had appeared in the State Court* and *failed in an effort to litigate* the question of fraud involved in that case. Other cases will be noted in our brief.

The Circuit Court in the instant case then says further:

> "thus appellant sought to relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California, and which had there been determined against him. This he could not do. (Citing cases.)
>
> "The Referee's order was correct. The Bankruptcy Court's judgment, which affirmed the order in part and reversed it in part, is modified so as to affirm it ***in toto.***
>
> "As thus modified, the judgment is affirmed."

As authority for the statement that appellant could not "relitigate in the Bankruptcy Court an issue which he had previously litigated in the Courts of California," the opinion cites *Hobbs v. Franklin Jewelry Co.* (Fifth Circuit), 131 Fed. (2d) 432.

Thus it is seen that the Referee in Bankruptcy found himself unable to agree with the case of *Hobbs v. Franklin Jewelry Co.* and *repudiated* the doctrine of said case [R. 69]; the District Judge in his minute order on review *cited with approval* said case of *Hobbs v. Franklin Jewelry Co.* [R. 105] and now we find that the Circuit Court of Appeals in partly reversing the District Judge and affirming the Referee *in toto* cites with approval the same

case of *Hobbs v. Franklin Jewelry Co.* as authority for its order of affirmance [R. 135], while the Referee in the *very proceedings which were affirmed repudiated and refused to follow the same case.*

And as further authority on the same point in note 5 of the opinion the Circuit Court cites six cases heretofore decided by this Honorable Supreme Court of the United States. Suffice it to say that we earnestly urge with due respect to the Honorable Circuit Court of Appeals for the Ninth Circuit that not one of the cited cases is determinative of the issue in the instant case and none is in point herein and none is controlling.

In the cited case of: *Mitchell v. First National Bank*, 180 U. S. 471, *no question of Federal Law was involved*, it was a *diversity case* and the question was as to liability on a guaranty. The statement of the Court therein that a question presented in State Courts is *res adjudicata* whether depending on Federal, general or local law is *purely dictum*, as no *Federal question was involved.*

The cited case of *Lion Bonding and Surety Co. v. Karatz*, 262 U. S. 77 was a *diversity case* involving the appointment of receivers.

The cited case of *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470, was a suit in equity to restrain the Public Utilities Commission of the State of Ohio from enforcing an order concerning the operation of motor buses. We quote from the decision at page 473:

> "The parties were all citizens of Ohio, and the *sole ground advanced for invoking the jurisdiction of the Federal Court was* that the suit was one arising under the constitution of the United States and *involving more than Three Thousand Dollars.*"

The cited case of *Baldwin v. Iowa State Traveling Mens Assn.*, 283 U. S. 522, involved the doctrine of *res adjudicata as it applied between the United States District Court for Western Missouri* and the *United States District Court for Southern Iowa*, and concerned mainly the due process clause guaranteed by the fourteenth amendment.

In the cited case of *American Surety Co. v. Baldwin*, 287 U. S. 156, the validity of an *Idaho State Court* judgment and of a decree of the *Circuit Court of the Ninth Circuit* was challenged under a claim that the judgment was void under the *due process clause* of the Fourteenth Amendment.

The cited case of *Treinies v. Sunshine Mining Co.*, 308 U. S. 66, involved a proceeding under the *interpleader act*, the occasion for which action was the existence of *inconsistent judgments* as to the ownership of certain stock.

None of the above cases relied on by the Circuit Court involved any question under the *Bankruptcy Statutes*, nor did any of these cases present, as here, an *ancillary and dependent bill in equity.*

They do not control because of the language of this Honorable Court in its latest expression on the subject in *Local Loan Co. v. Hunt, supra.* We quote in part as follows:

> *"It is important to bear in mind that the present case is one not within the jurisdiction of a State Court, but is a dependent suit brought to vindicate the decrees of a Federal Court of Bankruptcy entered in the exercise of a jurisdiction essentially Federal and exclusive in character. And it is that situation to which we address ourselves and to which our decision is confined."*

We respectfully suggest that the action of the lower Federal Courts since this Court expressed itself in *Local Loan Co. v. Hunt, supra*, is one of the most compelling reasons for the granting of certiorari in the case at bar.

May we invite attention to the situation in the Fifth Circuit. The case of *In re Skorcz*, 67 Fed. (2d) 187, decided by the Circuit Court of Appeals for the Seventh Circuit was the decision which the same Court followed in deciding *Local Loan Co. v. Hunt* in memorandum fashion (67 Fed. (2d) 998), which found approval by the Supreme Court of the United States (292 U. S. 241).

Then in 1940 the Circuit Court of Appeals for the 5th Circuit, in *Davison, Paxon Co. v. Caldwell*, 115 Fed. (2d) 189, followed explicitly the doctrine announced by this Honorable Court in *Local Loan Co. v. Hunt, supra*, in a state of facts strikingly similar to the case at bar.

Then in 1942 the same Circuit Court of Appeals for the 5th Circuit, decided the case of *Hobbs v. Franklin Jewelry Co.*, 131 Fed. (2d) 432 (relied on by the District Judge and the Circuit Court of Appeals in the instant case), wherein the Court absolutely *ignores* the doctrine which that Court itself had embraced two years before in the case of *Davison, Paxon Co. v. Caldwell, supra*, and absolutely ignored the case of *Local Loan Co. v. Hunt, supra*, decided by this Court. Inasmuch as the *Skorcz* case and the *Caldwell* case and the case of *Local Loan Co. v. Hunt, supra*, have never been overruled we respectfully suggest that the case of *Hobbs v. Franklin Jewelry Co.* which seems to have controlled the decision herein of the Circuit Court for the Ninth Circuit *does not correctly state the law* and *is not precedent herein.*

A similar situation exists in the *Ninth Circuit* where pends the case at bar. In 1933 the Circuit Court for the Ninth Circuit decided the case of

Sims v. Jamison, 67 Fed. (2d) 409,

in which it affirmed the issuance of an injunction similar to that prayed for in the instant petition in the District Court upon the authority of *Seaboard Small Loan Corporation v. Ottinger* (4th Cir.) (50 Fed. (2d) 856); and then in 1938, in the case of

Holmes v. Rowe, 97 Fed. (2d) 537,

the Circuit Court of Appeals for the *Ninth Circuit* affirmed the granting of a permanent injunction similar to that sought in the instant proceeding *after the petitioner therein had litigated the validity of the judgment in the State Court* (p. 538). In this case the Court again followed the *Ottinger* case, *supra*, and its own case of *Sims v. Jamison* (9 Cir.) *supra*, and the case decided by this Honorable Court,

Local Loan Co. v. Hunt, supra;

and then in April of 1944 we find the opinion in the instant case [R. 133] entirely ignoring *Sims v. Jamison* and *Holmes v. Rowe, supra*, and failing to follow *Local Loan Co. v. Hunt.*

If it may be urged, as is indicated in the Circuit Court opinion herein, that there is a distinction between the instant case and those of the Ninth Circuit heretofore cited on the point that in the instant case *previous litigation* had been had in the State Court before the petition was filed in the Federal Court, may we respectfully suggest that the point is *not determinative* because in the case of *Holmes v. Rowe, supra*, the petitioner had *twice met defeat* in the *State Courts on motions made by him.*

Another anomalous situation exists in the *Fourth Circuit*. Early the Circuit Court of Appeals for the *Fourth Circuit* decided the case of *Seaboard Small Loans Inc. v. Ottinger,* 50 Fed. (2d) 856, which became one of the leading cases guiding subsequent decisions of Federal Courts in determining that a bankruptcy trial court has jurisdiction to decide whether or not the discharge relieves the bankrupt of his debt. It was cited with approval by the *Ninth Circuit Court of Appeals* in *Sims v. Jamison, supra*, and again by the *Ninth Circuit Court* in *Holmes v. Rowe, supra*, wherein at page 540 the *Ottinger* case was quoted at length. It has received wide support and was approved by this Court in the case of *Local Loan v. Hunt*. And yet in 1942 we find the same *Fourth Circuit* Court of Appeals in the case of *Helms v. Holmes*, 129 Fed. (2d) 263 (by a divided Court), while recognizing that it had theretofore applied the principles announced in *Seaboard Small Loan Corporation v. Ottinger* and while being aware of the rule announced in *Local Loan Co. v. Hunt*, declining to follow the principles announced in these cases because the bankrupt in the case before it had *failed to seek redress in the State Court*. And in so doing they cited with approval the case of *In re Weisberg* (D. C.), 253 Fed. 833, which case had been by this Court expressly overruled in *Local Loan Co. v. Hunt, supra* (please see the vigorous and able dissenting opinion of Judge Paul in this case).

We thus have a very peculiar situation confronting us in the case at bar. The Ninth Circuit Court of Appeals says to petitioner in the instant proceeding that the Federal Court has *no jurisdiction to grant* the relief prayed *because the petitioner litigated in the State Courts*, while the *Fourth Circuit Court of Appeals* in *Helm v. Holmes,*

supra, ruled that the same relief could not be accorded by the Federal Court because the petitioner therein *had not sought relief in the State Courts.*

We also have a situation arising by virtue of this Court's decision in *Local Loan Co. v. Hunt, supra,* which we think compels the attention of this Honorable Court and which should be reached by a *writ of certiorari* herein. Both the Referee below and the District Judge, on review, have *seized upon* a statement in *Local Loan Co. v. Hunt, supra,* to justify their refusal to assume jurisdiction in the case at bar. It follows:

> "It does not follow, however, that the Court was bound to exercise its authority. And it probably would not and should not have done so except under *unusual circumstances such as here exist.*" (Emphasis ours.)

In the interests of brevity at this point we shall reserve argument for our accompanying brief on this question, but we desire to point out that because of the varied and inconsistent approaches by the lower Federal Courts to the doctrine announced in *Local Loan Co. v. Hunt, supra,* the statement last above quoted could be clarified by this Court with propriety. With due respect to this Honorable Court we make bold to suggest that in the circumstances and in view of the context the quoted passage verges closely on *dictum,* especially as it deals in probabilities. The statement seems not to be necessary to the decision and not decisive of any issue raised. But, be that as it may, we cannot conclude that this Honorable Court by the use of these words meant to retract and vitiate its unequivocal declaration of jurisdiction immediately preceding the statement (p. 241 of 292 U. S.).

Petitioner also finds himself in a situation from which he can only be extricated by a review in this Court. No Federal Court has yet ruled on the merits of his petition herein and the sole question really involved in the case, to-wit:

What Is the Nature of the State Court Judgment?

True, the Referee made findings of fact and conclusions of law but the District Judge ruled that they were improper and reversed them. The Circuit Court of Appeals reinstated the findings but did not pass upon the merits of the case holding that the case could not be "relitigated" in the Federal Court. But the findings have been reinstated by decree of the Circuit Court while at the same time said Court refused to review them. There are thus in existence findings of fact and conclusions of law which may become *res adjudicata* as to this petitioner, while at the same time he has been denied a review of them by the Circuit Court of Appeals, which appeal on the merits is a matter of right sustained by Judicial Code section 128, as amended (28 U. S. C. A., Sec. 225).

Brief in Support of This Petition.

Annexed to this petition, and as a part of same is a brief in support thereof.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Honorable Court for its review and determination, on a day to be named therein,

a full and complete transcript of the record and all proceedings in the case numbered 10502 in that Court, entitled "Byron J. Walters, Appellant, vs. Edith Maud Wilson, Appellee," and that its judgment therein made on April 8, 1944 may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and equitable.

Dated at Los Angeles, California, this 30th day of June, 1944.

BYRON J. WALTERS,
Petitioner,

By SAMUEL P. BLOCK,
His Counsel.

PIERSON & BLOCK,
Of Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that the said petition is not interposed for delay.

Dated this 30th day of June, 1944.

SAMUEL P. BLOCK,
Counsel for Petitioner.